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INSURANCE

WESLEY M. WALKER*

During the past year the United States Court of Appeals for the Fourth Circuit still felt the impact of hurricane "Hazel" which brought destruction to beaches in South Carolina in October of 1954. Two cases were before this court which arose out of damages resulting from "Hazel". The case of *Firemen's Ins. Co. v. Senseney*,¹ an action against the insurer on a windstorm policy covering insured's house for loss caused by windstorm but excluding loss caused by water whether driven by wind or not, was heard without a jury by the district judge who found that damage to insured's house was caused by another house being blown against it rather than having been floated against it by action of wind driven water. This being a pure question of fact and there being nothing in the record to justify a holding that the judge's finding was clearly erroneous, the Court of Appeals affirmed the judgment of the court below.

The case of *Hanover Fire Ins. Co. v. Ivey*,² an action on a windstorm policy providing for loss covered by windstorm but excluding loss caused by water, whether driven by wind or not, was heard by a jury which found a verdict for plaintiff insured. The question raised on appeal was the sufficiency of the evidence to take the case to the jury, there being evidence that even after the washing away of part of the foundation, the building would have stood indefinitely if the wind had not blown against it in such a way as to completely wreck it. The Court of Appeals held a case was properly made for the jury's consideration.

Fraudulent Breach of Contract

On a policy of life insurance issued by defendant to the husband of plaintiff in the case of *Cain v. United Ins. Co.*,³ and naming plaintiff beneficiary, the defendant insurance

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1. 250 F. 2d 130 (4th Cir. 1957).

2. 250 F. 2d 110 (4th Cir. 1957).

3. 232 S. C. 397, 102 S. E. 2d 360 (1958).

company denied liability upon the ground that the policy was procured by fraudulent misrepresentations. A verdict of the jury for actual and punitive damages was set aside by the trial judge who directed that judgment be entered in favor of defendant. The insured represented in his application that he was in good health and had not been confined to a hospital within the past two years when, as a matter of fact, upon his death it was disclosed that he had been confined to the Veterans Hospital.

The Court held that the action of the plaintiff for fraudulent breach of contract, regarded as an action *ex contractu*, must fail. To sustain such a cause of action, there must be a valid contract. There was not a valid contract in this case as the policy was procured by fraud. The Court further held that even if, shortly after the death of insured, insurer's agent improperly obtained possession of policy and receipt book and the company undertook to cancel the policy, such acts would not vitalize the insurance contract.

Wrongful Cancellation of Policy

The case of *Winchester v. United Ins. Co.*⁴ involved an action by insured against health and accident insurer for alleged wrongful cancellation of a policy. From a judgment for plaintiff insured, the company appealed and the Supreme Court held, reversing and remanding the case, that damages for wrongful cancellation of health and accident policy could not include an amount representing benefits to which insured would have been entitled had he required surgery or which would have been paid had he sustained an accidental death inasmuch as these damages might never accrue. Proof as to probability of such damages must be established with reasonable certainty.

In the second *Winchester* case,⁵ an action to recover for alleged wrongful cancellation of another insurance policy, the Supreme Court held that, properly construed, the policy in question providing for hospitalization and accidental death benefits could be cancelled in event premiums were not paid when due or within grace period and that it had been error for the trial court to refuse a request to so instruct the jury. An insurer cannot, however, forfeit a policy for non-payment of

4. 231 S. C. 462, 99 S. E. 2d 28 (1957).

5. *Winchester v. United Ins. Co.*, 231 S. C. 483, 99 S. E. 2d 34 (1957).

premium if it was indebted to insured on due date for an amount equal to or greater than the amount of the premium.

Disability Under Policy

The plaintiff in *Robinson v. Carolina Casualty Ins. Co.*⁶ was insured under a policy of insurance issued by defendant whereby it was agreed that the company would pay plaintiff a certain sum as weekly indemnity for loss incurred as a result of accidental bodily injury. Plaintiff was shot by another person and disabled for a period of time. The sole question was whether or not the cause of the disability was accidental. The testimony was to the effect that the gun had been picked up by the person who fired the shot merely to scare plaintiff and that she had no intention of shooting and plaintiff had no reason to believe she would shoot. The trial judge found that the only reasonable inference to be drawn from the entire testimony was that the injury was not provoked by plaintiff and was unforeseen as far as he was concerned.

The Supreme Court held that it was for the trial judge to determine, based on the evidence before him, whether or not plaintiff was injured by the intentional act of another and whether plaintiff should have foreseen that his conduct would probably result in his injury — further, that there was evidence to support the findings of the trial judge determining these issues in favor of plaintiff.

In the case of *Kilgore v. Reserve Life Ins. Co.*⁷ action was brought on a policy insuring plaintiff against loss of life, limb, sight or time resulting directly and independently of all other causes from accidental bodily injury sustained while the policy was in effect. The sole question before the Supreme Court was whether the court below erred in refusing defendant's motion for a directed verdict upon the ground that the accidental injury suffered by plaintiff was not the sole cause of his disability, defendant claiming that plaintiff had a pre-existing arthritic condition which contributed to or cooperated with the injury and caused the disability. Plaintiff had slipped on a wet floor and fallen on his back and his disability resulted thereafter although the evidence was to the effect that he had a latent pre-existing arthritic condition. The Court held that the fact that plaintiff had not suffered

6. 232 S. C. 268, 101 S. E. 2d 664 (1958).

7. 231 S. C. 111, 97 S. E. 2d 392 (1957).

any from this condition prior to the fall was some evidence that his disability was due to the fall; the doctor's testimony was that the condition was dormant and only became active after the accident and the Court stated such conclusion would warrant recovery — that plaintiff was not required to be in perfect health at the time of the accident in order to recover disability benefits under the policy.

Sound Health

The facts in the case of *Bowling v. Palmetto State Life Ins. Co.*⁸ were that the plaintiff's deceased father made application for insurance, the application providing that the policy, if issued, should become effective "if the life proposed is alive and in sound health at date of policy". On January 23, 1954 the initial premium was accepted and the receipt therefor provided that acceptance was subject to terms of the policy; that one of the policy conditions was that it would take effect on the date of its issuance provided insured was then alive and in good health. The policy was prepared and mailed by the home office to the Greenville office on January 28 with five other policies all dated February 1, 1954 and all appeared on the "Life Register" dated January 25, 1954. The policy was never delivered to the applicant. The accident which caused the death of plaintiff's father occurred January 23, 1954, before acceptance or rejection of the application for insurance. Testimony was permitted, over objections of defendant's attorneys, to the effect that the agent of the company told deceased at the time he paid the premium that the policy became effective immediately.

The Court held that the written application and the written receipt for the initial premium constituted the agreement between deceased and the defendant and that they constituted a contract not for present insurance but for issuance and delivery of a policy to be effective if applicant were alive and in sound health on the date of the contemplated policy. By some thread, not easily perceivable, the Court distinguished this case from that of *Cantor v. Reserve Loan Life Ins. Co.*,⁹ and held that the testimony to the effect that the receipt for the premium was intended to put the insurance in force at

8. 231 S. C. 613, 99 S. E. 2d 407 (1957).

9. 161 S. C. 198, 159 S. E. 542 (1931), and subsequent appeal, 169 S. C. 338, 168 S. E. 848 (1933).

once was inadmissible, it purporting to establish by parol a contemporaneous agreement at variance with the terms of the written contract. Recovery could not be predicated upon the policy being shown on the "Life Register" and having been mailed before death of applicant. Thus, plaintiff's father, having suffered a mortal injury on January 23 was not in sound health on the date of its issuance.

Fire Policies

*Lundy v. Lititz Mutual Ins. Co.*¹⁰ involved a suit on a policy insuring plaintiff's dwelling against fire for a period of one year. The house was destroyed by fire on January 27, 1956 and the defense interposed was that the policy was cancelled on August 5, 1955 and the unearned premium remitted to and accepted by the insured. The insurer appealed from a judgment against it for the face amount of the policy.

The policy provided for cancellation at any time by the company by giving five days' written notice of cancellation with or without tender of the excess of paid premiums above the pro rata premium for the expired time and if not tendered, should be refunded on demand. The insurance company sent to insured a check covering such refund of premium with notation thereon that the policy on the house was thereby cancelled, and the check was cashed some months later by plaintiff. Along with the check, in the same envelope, was a notice that policy on the store of insured was cancelled. The testimony of insured and agent of the company was conflicting as to statements made by the agent to insured regarding said check and notice enclosed and the Court held that the evidence presented a question for the jury as to whether the house policy had been cancelled — that notice of cancellation must be unambiguous; otherwise, it must be resolved in favor of insured.

The case of *Tires, Inc. v. Travelers Fire Ins. Co.*¹¹ was a declaratory judgment action brought by a group of fire insurance companies to have the court construe whether or not the facts of a rather large loss to the insured showed an explosion within the terms and provisions of fire insurance policies issued by the companies which had extended coverage endorsements. The insured demanded trial by jury and the jury de-

10. 232 S. C. 1, 100 S. E. 2d 544 (1957).

11. 253 F. 2d 411 (4th Cir. 1958).

terminated the issue in favor of the insurance companies, finding that no explosion occurred. An interesting evidentiary question arose concerning the admissibility of the sworn proof of loss filed by the insured setting forth that the cause and origin of the loss sustained was, "ruptured water main, eight inch water main in front of store was ruptured by air hammer, flooding building, breaking windows, and deluging contents". The insurance companies contended that the proof was admissible as being a previous statement under oath contrary to the asserted position of the insured that its loss had occurred by reason of an explosion. The insured took the position that the proof was inadmissible since the insurance company had rejected the proof and, therefore, had no right to demand a proof of loss. The Court of Appeals held that the proof of loss was clearly competent as an admission against interest even though denial of liability by the insurance company waived the necessity for such proof. The court cited *Orenstein v. Star Ins. Co.*¹² which case also arose from South Carolina.

The insured also argued upon appeal that its motion for a directed verdict should have been granted and the court should have concluded as a matter of law that an explosion had occurred. A water main in front of plaintiff's place of business burst and the insurance company contended the cause of the rupture was the operation of an air hammer by a plumbing company and that this air hammer punctured the water line releasing the water while the insured contended that the vibrations of the air set up a water hammer inside the water main and that this water hammer caused an explosion within the meaning of the word as used in the policy. Expert testimony was offered by both the parties and the Court of Appeals held that whether or not an explosion occurred was clearly a matter for the jury to decide.

Defense by Insurer

Plaintiff brought suit against the insurance company in *Pennsylvania Threshermen & Farmers' Mutual Casualty Ins. Co. v. Thornton*¹³ after obtaining judgment against insured under an automobile liability policy. The summons was turned over to the insurance agency which had issued the policy on

12. 10 F. 2d 754 (4th Cir. 1926).

13. 244 F. 2d 823 (4th Cir. 1958).

the twenty-first day after service had been made, one day after the time for answering had expired. The insurance company maintained that there was unreasonable delay in delivering this paper. The company also claimed it did not receive the summons until some three months after the time for answering had expired and at such time, it obtained a non-waiver agreement from the insured. Upon receiving the paper, the insurance company raised a technical question as to the validity of service on the insured, who was a prisoner in the State penitentiary at the time. The insurer claimed that under the terms of the policy the insured agreed to deliver all papers served on him without unreasonable delay. The Supreme Court held that what was a reasonable time was a question of fact for the jury and was decided against the company in this case and, further, that insurer could not, after choosing to raise a technical question instead of seeking leave to defend on merits, successfully insist that it had been released from its obligations because papers were delivered to it too late. And although the insurance company had obtained a non-waiver agreement and was proceeding under a reservation of its rights, it could not take control of the case and yet let many weeks pass by before interposing a plea. Its dilatory procedure was not protected by the non-waiver agreement.

Procedure

Of the two actions of *Ross v. American Income Life Ins. Co.* and *Ross v. American Standard Ins. Corp.*,¹⁴ consolidated on appeal, one was to recover damages for fraudulent breach of an insurance policy and the other to recover damages for fraud and deceit in inducing plaintiff to enter into a contract of insurance. The trial judge, upon motion of defendants to set aside the service of the summons, refused to grant such motion and defendants appealed.

The defendants — insurance companies — were Indiana corporations, neither having been licensed to do business in South Carolina nor maintaining any office, having any property or having any agent in the State of South Carolina. Plaintiff, in 1948, applied by mail to defendant, American Standard Insurance Corp., for an accident and health insurance policy which was issued to plaintiff and received by him through the mail. In 1955 plaintiff was notified that

14. 232 S. C. 433, 102 S. E. 2d 743 (1958).

American Income Life Insurance Co. had entered into a reinsurance agreement with the American Standard Insurance Corp. and he, thereafter, received a reinsurance certificate from American Standard and paid all premiums to that company. Plaintiff claimed insurer wrongfully cancelled said policy on May 14, 1956.

Service of the summons and complaint was had upon the Insurance Commissioner in accordance with section 37-265 of the 1952 Code of Laws of South Carolina.¹⁵

Appellant insurance companies contended the statute constitutes a denial of due process guaranteed by the Fourteenth Amendment, particularly if construed as applicable to the issuance and delivery of a single policy and that, further, if the statute is valid, substituted service may not be had under it in tort actions.

The Court held, with regard to the question of service, that the statute did not violate the constitutional rights of the foreign insurer and reinsurer although their only contact was through issuance and delivery by mail of a single policy.

As to the contention of appellants that service could not be had under the statute in a tort action, the Court assumed that one complaint was for breach of an insurance policy accompanied by fraudulent acts and the other for fraud and deceit in inducing plaintiff to purchase said insurance policy. A cause of action for fraudulent breach of a contract, being regarded under our decisions as *ex contractu*, the Court stated that it was clear that such an action is within the scope of our act authorizing service upon the Insurance Commissioner.¹⁶ The Court held service should be vacated in the action for fraud and deceit, it not arising out of the insurance policy and not being *ex contractu*.

In the case of *Thomas v. Nationwide Mutual Automobile Ins. Co.*,¹⁷ the appeal was from an order denying a motion to change the place of trial. The accident resulting in this action occurred in Berkeley County and involved three vehicles: a

15. Section 37-265: "The issuance and delivery of a policy of insurance or contract of insurance or indemnity to any person in this State or the collection of a premium thereon by any insurer not licensed in this State, as herein required, shall irrevocably constitute the Commissioner and his successors in office the true and lawful attorney in fact upon whom service of any and all processes, pleadings, actions or suits arising out of such policy or contract in behalf of such insured may be made."

16. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 37-265.

17. 232 S. C. 392, 102 S. E. 2d 266 (1958).

truck driven by plaintiff, a school bus (the liability carrier being Nationwide Mutual Automobile Insurance Co.), and an International truck. Plaintiff brought action in Berkeley County for personal injuries against Nationwide and the International truck and Griffin, the driver thereof. The defendant Griffin moved for an order changing the place of trial to Colleton County, the residence of said Griffin, upon the ground that Nationwide was a sham and immaterial defendant and that plaintiff's cause of action, if any, accrued in the Court of Common Pleas for Colleton, not Berkeley, County as the defendant was a resident of Colleton County and the International truck was located in Colleton County.

The Supreme Court held that the action against liability insurer of operation of State-owned school bus was properly laid in county in which the accident involving the school bus took place and, further, that the complaint stated a cause of action against Nationwide Mutual as well as against the other defendants named.

The question before the Court in the case of *McLeod v. Rose*¹⁸ was whether the court below erred in refusing defendant's motion for a mistrial upon the ground that plaintiff's counsel brought out the fact that defendant was protected by liability insurance. A police officer, witness for defendant, had given a statement to an insurance adjuster at the time of the accident. Defendant knew this and that the statement had been shown to the police officer right before he went on the witness stand. On cross examination, this witness was asked who he gave the statement to and the reply was: "To the insurance adjuster".

The Court concluded that defendant should have objected to the question before the answer was given and that the question itself was subject to more than one reasonable conclusion. The factor of the witness implying protection by liability insurance being a witness of defendant is a factor to be properly considered by the court in determining whether to grant a mistrial.

The Court held in the case of *Crook v. State Farm Mutual Automobile Ins. Co.*,¹⁹ *inter alia*, that the action, being one based upon contract, was subject to any proper defense by the

18. 231 S. C. 209, 97 S. E. 2d 899 (1957).

19. 231 S. C. 257, 98 S. E. 2d 427 (1957).

insurance company under the terms of its contract. The insurer set forth in its answer a violation of the policy. The Court stated that the allegations tended to show a state of facts under which the insurer would be relieved of liability, even if the allegations of the complaint were all true and that the lower court was in error in granting the motion to strike the stated allegations of the answer.

Regulation of Insurance Companies

The question involved in *Clark v. Preferred Accident Ins. Co.*²⁰ was whether the \$50,000 in government bonds deposited as a prerequisite to doing a surety business in South Carolina might be treated as assets of the insolvent company or, since no surety claims had been filed, might be withdrawn by the foreign statutory liquidator, in toto, without being subject to costs or other claims against the insolvent debtor. The Court determined that the statutory liquidator had title to assets of the insolvent corporation subject to rights and limits of creditors pursuing same against local assets. The title of the statutory liquidator of a foreign corporation must be given full faith and credit but it is subject to rights and remedies of creditors pursuing same in the state where the property is located.

20. 231 S. C. 167, 97 S. E. 2d 498 (1957).